IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, On Behalf Of Himself And All Other Purchasers And Sellers Of "Odd-Lots" On The New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, URGING REVERSAL, AND BRIEF FOR THE AMICI CURIAE PUBLIC CITIZEN AND CONSUMERS UNION OF UNITED STATES, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, URGING REVERSAL

Public Citizen and Consumers Union of United States, Inc. hereby move this Court under Rule 42 of this Court for leave to file a brief *amicus curiae* urging reversal of the decision of the United States Court of Appeals for the Second Circuit, which is now reported at 479 F.2d 1005. The consent of the parties to file such brief has been sought and was orally given by petitioner but was refused by respondents.

Public Citizen and Consumers Union are non-profit corporations supported by the public. They engage in a wide variety of consumer activities both in the courts and before regulatory bodies. Attorneys on their staffs represent consumers in various legal proceedings, including class actions. Attorneys from Public Citizen represent the plaintiff class in one such action, *Ditlow v. Pan American World Airways, Inc. et al.*, No. 73-1936, D.C. Cir., in which a class of approximately 600,000 transpacific air passengers is seeking to recover damages for alleged violations of the Federal Aviation Act and the Sherman Antitrust Act. The outcome in the instant case may well as a practical matter determine whether the passengers in *Ditlow* will be effectively precluded from recovering their damages, the likely result if the decision of the Second Circuit is sustained by this Court.

This case is of extreme importance to the future of consumer class actions brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and thus should be decided only after consideration of a variety of views on the issues presented. Yet, because most of the judicial treatment of these questions has arisen in the Second Circuit from which this case comes, alternate approaches to the problem cannot be supplied, as in many other cases, by other Courts of Appeals which have considered the matter. Accordingly, it is particularly appropriate that persons likely to be affected by the disposition of this case be permitted to present their views as *amici*.

Moreover, both the lower courts and the parties have dealt with this case primarily in terms of whether personal notice, paid by the plaintiff, is required, and whether the procedure utilized by the District Court to limit personal notice and to allocate the costs of notice based on

probability of success, is authorized by Rule 23 and due process. Our brief will suggest that there is an alternative procedure available, which is unlikely to be fully discussed by the existing parties, and which will permit this case to proceed to the merits without imposing undue costs on anyone and without violating the rights of any person under the Constitution or Rule 23.

The position taken in our brief is that, while Rule 23(c)(2) admittedly requires that at some time personal notice be given to all members of a Rule 23(b)(3) class who can be reasonably identified, nothing in that Rule or in the concept of due process requires that the personal notice be given at the plaintiff's expense at the time that the class is certified. We suggest that a more generalized form of notice at the initial stage, followed by individual notice to identifiable class members at the time that liability has been established against the defendants, comports with the letter and spirit of Rule 23 and affords due process to the members of the plaintiff class and to the defendants. This solution will both minimize unnecessary notice costs and still insure that the legitimate interests of the named plaintiffs, the remaining members of the class, and the defendants are not sacrificed. If such procedures are followed, class actions under Rule 23(b)(3) can be maintained without undue burdens to anyone.

This position, which is more fully discussed in our brief, has not been and is unlikely to be briefed by the existing parties. We believe that it is desirable for the Court to have before it all of the reasonable alternative approaches to Rule 23 before it decides under what conditions consumer class actions may be maintained. The brief of Public Citizen and Consumers Union will discuss one alternative that is otherwise unlikely to be presented, and

it is primarily to bring this alternative before this Court that leave to file a brief *amicus curiae*, urging reversal, is sought.

Respectfully submitted,

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November 29, 1973

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INTERESTS OF THE AMICI CURIAE

Public Citizen is a non-profit corporation supported entirely by donations from the public. It engages in a wide variety of consumer activities both in the courts and before regulatory bodies. Attorneys on its staff represent consumers in various legal proceedings, including class actions. Its attorneys represent the plaintiff class in one

such action, *Ditlow v. Pan American World Airways, Inc., et al.*, No. 73-1936, D.C. Cir., in which a class of approximately 600,000 transpacific air passengers is seeking to recover damages for alleged violations of the Federal Aviation Act and the Sherman Antitrust Act. On a single damages basis, the recovery per person will average more than $40 in that case.[1] A copy of the complaint is reproduced as Appendix A to this brief. In *Ditlow* the District Court, without opinion, granted the defendants' motion to dismiss based upon the alleged exclusive jurisdiction of the Civil Aeronautics Board over the matter, even though it was conceded the Board had no power to award plaintiffs any damages. If plaintiffs are successful on their pending appeal from that ruling, they will be faced with similar class action problems to those involved in the instant proceeding. Therefore, the outcome in this case may well as a practical matter determine whether the passengers in *Ditlow* will be effectively precluded from ever recovering their damages.

The *amicus* Consumers Union of United States, Inc., is also a non-profit organization which engages in a variety of activities to advance the interests of consumers in the courts and before regulatory agencies, including the bringing of class actions. The outcome of this case may also have a direct bearing on the right of some of the more than 375,000 members of Consumers Union to obtain recoveries as a result of class actions which are either now pending or may be brought in the future.

Both the lower courts and the parties have dealt with this case primarily in terms of whether personal notice,

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[1] This is based on a passenger who flew between the West Coast and Japan, coach class, round trip, and without any special fare reductions.

paid by plaintiffs, is required and whether the procedure utilized by the District Court to limit personal notice and to allocate the costs of notice based on probability of success, is authorized. In our view there is an alternative procedure available under Rule 23 that will permit this case to proceed to the merits without imposing undue costs on anyone and without violating the rights of any person under the Constitution or Rule 23. It is because this alternative is unlikely to be fully discussed by the existing parties that *amici* are filing this brief.

SUMMARY OF ARGUMENT

The decision of the Second Circuit, which is now reported at 479 F.2d 1005, approaches Rule 23 in a wholly unrealistic manner, and by doing so has stripped all life from consumer class actions brought under Rule 23(b)(3). The result of the ruling by the Court of Appeals is to make it virtually impossible, as a practical matter, to bring significant consumer class actions under that provision because no plaintiff will ever advance the staggering costs which the Court of Appeals has said he must pay. In fact, the more important the action – *i.e.*, the greater number of consumers who were injured by the conduct of the defendant – the less likely it is that the action can be maintained under the appellate court's construction of Rule 23. In reaching that construction, the Court erroneously supported its position by references to concepts of due process without an appreciation that due process is a relative concept, and that the alternatives must be fully considered before deciding that due process requires individual notice to every person as soon as the class has been certified. Furthermore, the decision below suggests that, because the judgment may run into "astronomical amounts,"[2] the

[2] 479 F.2d at 1019.

result is somehow unfair to the defendant who otherwise would be permitted to keep his unlawfully obtained profits.

The decision of the Court of Appeals, which undoubtedly will leave millions of injured persons in this and other cases without a remedy, apparently rejects other procedural alternatives which would insure that the rights provided by this Court under Rule 23(b)(3) are more than theoretical ones. While Rule 23(c)(2) admittedly requires personal notice to all members of a (b)(3) class who can be reasonably identified, nothing in that Rule or in notions of due process requires that the personal notice be given at the plaintiff's expense, at the time that the class is certified. We believe that a more generalized form of notice at the initial stages, followed by individual notice to identifiable class members at the time that liability has been established against the defendants in favor of the plaintiffs, comports with the letter and spirit of Rule 23 and affords due process to the members of the plaintiff class and the defendants. This solution will both minimize unnecessary notice costs and, at the same time, insure that the legitimate interests of the named plaintiffs, of the remaining members of the class, and of the defendants are not sacrificed. If such procedures are followed, class actions under Rule 23(b)(3) can be maintained without an undue burden on anyone. If not, consumers will be required to seek remedial legislation to protect their interests. [3]

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[3] *Amici*'s position in this brief is necessarily limited to Rule 23 as it is presently constituted. It should not be construed as an endorsement of certain limitations on class actions in that Rule and in the Judicial Code. *Amici* believe that those limitations should be removed, albeit not by litigation.

ARGUMENT

I. RULE 23(c)(2)'s REQUIREMENT OF PERSONAL NOTICE DOES NOT MANDATE THAT IT BE PROVIDED IMMEDIATELY AFTER THE CLASS IS CERTIFIED

The decision of the Court of Appeals requires that personal notice be given to all persons who can reasonably be identified as members of the class. Moreover, and this is by far the more serious problem, it requires that notice be paid for by the plaintiffs and that it be given when the class is certified and before any further proceedings take place. We agree with the Court of Appeals that the language in Rule 23(c)(2) is clear and that before any distribution, that Rule requires that personal notice be given at some time to each member of the plaintiff class who can reasonably be identified. Thus, where liability has been established, known class members, who have apparently valid claims against a defendant, cannot be denied the opportunity to prove their claims because of an "assignment" of their recovery to members of the fluid class, absent specific legislation authorizing such a procedure. Surely, when we are dealing with a situation in which liability has been established, and not merely the beginning of a lawsuit, where a possibility of recovery exists, an effort must be made to notify class members before making an assignment of their recovery to a fluid class. To the extent that the position of the plaintiff in this case suggests otherwise, we must disagree.

However, the decision of the Court of Appeals did not merely rule that notice must be given to known members of the class prior to distribution. The Court held that such notice must be given immediately after class certification and must be paid for entirely by the plaintiff, except

perhaps in the few cases in which the defendant is in regular communication with members of the class for other reasons (*e.g.*, a corporation and its stockholders).[4] If this Court affirms that determination, it will have eliminated almost all significant consumer class actions under Rule 23(b)(3) for the simple reason that there will be no plaintiff who will advance the amount of money necessary to provide notice to thousands of individuals.

This result would obtain, even were the individual plaintiff a millionnaire, since in order for him to finance the suit, he must be not only rich but foolish. No rational plaintiff would ever put up the several hundred thousand dollars required to provide individual notice to every member of the class in this case[5] because at best, if the lawsuit were successful, he could recover only those costs, less the interest lost for the considerable period of time which the case would undoubtedly take to reach its conclusion. Moreover, if defendants prevailed, the entire expense would be lost. In short, a plaintiff is in a situation in which he is being asked to put forth an enormous amount of money, all of which he may lose, and with no opportunity to do any more than recoup his capital, less lost interest on it. There simply will be no one who will do that.

The only person who might make such an investment (because of the possible realization of legal fees if the

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[4] See 479 F.2d at 1009 n. 5. In that case plaintiff might only have to pay the added charge of including the notice, rather than the cost of the entire mailing.

[5] The cost of notifying the 2,250,000 identifiable members of the plaintiff class in this case is estimated to be $500,000. See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 263 (S.D.N.Y. 1971).

action is successful) is the plaintiff's attorney. He at least has the *possibility* of realizing a profit, albeit at considerable risk. However, Disciplinary Rule 5-103(B) of the Code of Professional Responsibility prohbits a lawyer from advancing or guaranteeing the expenses of litigation unless the client remains ultimately liable for such expenses. Since no client would obligate himself for such expenses, the possibility of a lawyer advancing the necessary funds is unlikely to materialize.

II. REQUIRING PERSONAL NOTICE ONLY AFTER LIABILITY IS DETERMINED WILL ENABLE CLASS ACTIONS UNDER RULE 23(b)(3) TO PROCEED ON THE MERITS WITHOUT PREJUDICING THE RIGHTS OF ANY PERSON

A. An Alternative Approach To The Problem Of Personal Notice

In part, the problem stems not from the requirement that plaintiff must pay for personal notice, but that he do so at the time that certification of the class is granted when there is a considerable risk that those costs will never be repaid. On the other hand, incurring such costs after the issue of liability has been determined in favor of the plaintiffs would not be a foolish act and would be fully justified in order to insure that individual members of the class have an opportunity to recover their damages personally. It should be noted that Rule 23(c)(2) itself does not mandate immediate personal notice to all members of the class who can be reasonably identified. In contrast to Rule 23(c)(1), which directs that a determination of whether the action may be maintained as a class shall be made "[a]s soon as practicable after the commencement of an action brought as a class action," there is no requirement

of immediacy under Rule 23(c)(2).[6] Therefore, we believe that, while individual notice is required at some point in the proceedings, nothing in the Rule or, as we shall show below, in the concept of due process, requires that notice be given at this stage of the proceedings.

In our view, the best way to reconcile the varying interests of the named plaintiffs, the remaining members of the plaintiff class, and the defendants in these kinds of cases, is to defer any required personal notice until after the liability issue is determined. However, we believe that some notice ought to be required as soon as practicable after the certification of the class takes place. This notice would be of a general type, such as publication in a few appropriate newspapers or magazines, designed to reach some members of the class. In this case, for example, notice could have been given for an estimated $21,720 which would have included large advertisements in major newspapers and individual notice to some 2,000 persons who appear to have the most significant interest in the proceeding as well as to 5,000 random members of the class.[7] While we believe that those costs, borne entirely by the plaintiffs, would be prohibitive in many cases, the figure is of a radically different order than the several hundred thousand dollars required to notify 2,250,000 members of the class, and thus it at least makes notice a possibility.

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[6] According to the Advisory Committee Notes accompanying Rule 23, the purpose of the requirement for a prompt ruling on the status of the action as a class action is "to give clear definition to the action . . ." 39 F.R.D. 98, 104 (1966). That purpose is obviously not relevant to the notice problems to individual class members under Rule 23(c)(2).

[7] See *Eisen v. Carlisle & Jacquelin, supra*, 52 F.R.D. at 263, 267-268.

The objectives to be achieved by this notice would include the assurance that persons with significant interests in the proceeding, as opposed to the multitude of individuals who will have very small interests and will not desire, for economic reasons, to assert them individually, can make their views known to the court. The returns from such notice may also reassure the court in its determinations that the named plaintiffs are adequately representing the class and that their claims are typical, as required by Rule 23(a). Such notice would also provide the opportunity for members of the class to opt out although, as Professor Kaplan has pointed out, the right to opt out and proceed on one's own is "no more than theoretic where the individual stake is so small as to make a separate action impracticable." B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391 (1967). Because some of these benefits may accrue, the effort of giving this notice should be undertaken. However, such generalized notice is unlikely to reach a significant number of members of the class, and thus the number of persons who obtain actual notice and decide to be represented by other counsel will be reduced. But since the alternative is no proceeding at all, Rule 23 must be read to permit this procedure, or there will be virtually no consumer class actions under Rule 23(b)(3).

After the general notice is given, the claim of the named plaintiff would then be litigated on the merits. In a great many of these cases, the issues are entirely ones of law with the outcome turning upon the interpretation of the relevant authorities. For instance, in *Ditlow v. Pan Am, supra,* there is no dispute that all of the defendant airlines agreed to impose the same 5% fare increase on every transpacific passenger

from May 1 – July 19, 1973. Hence the outcome of the case will turn upon the issues of law which are common to every member of the class – whether the Federal Aviation Act provides antitrust immunity on the undisputed facts of that case. The same kind of situation would obtain in class actions involving unlawful interest charges,[8] or in cases claiming an unlawful failure to pay interest on escrow tax payments made to a mortgagee with a monthly mortgage payment and held by it until the tax payment is due.[9] As soon as the liability issue is determined, an immediate appeal could be taken by the losing party.[10]

Regardless of who wins in the district court, the basic issues in the case would be decided in the court of appeals, and perhaps in this Court, before any individual notice would be sent to any member of the plaintiff class, except insofar as the district court decided it was advisable to notify a few individual members as part of the initial, general notice. If the defendants were victorious on the liability question, the only expenses of notice would be the relatively minor amounts necessary to give the general, pre-liability notice. On the other hand, if plaintiffs were judged to be correct on the liability issue, the matter

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[8] See *Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972).

[9] See *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7 (D.D.C. 1973).

[10] If plaintiff prevailed, it would be necessary either to ascertain his damages or grant injunctive relief so that a final order with respect to one of his claims could be entered and a direction entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure making the decision appealable.

would be referred back to the district court to ascertain the damages sustained by each member of the class. Only then would notice be sent under Rule 23(c)(2) to each individual member who could be identified. Thus, those class members whose financial stakes in the lawsuit are so small that the rights to opt out and appear through their own counsel are meaningful only at this stage, would have those interests protected, as provided in Rule 23(c)(2).

It is only after distribution is made to all known class members that it will be necessary for the court to consider what should be done with respect to those members of the class who cannot be readily identified. That question is one of substantive law, as the respondents concede in their statement of the questions presented on the petition for *certiorari*.[11] It is not a question under Rule 23, but in this case, for example, a question under the antitrust and securities laws and general principles of equity. Thus, the court would be required to determine whether, because of problems in locating individual members of a class, the defendant should be permitted to keep the damages, or whether as this Court held in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), there must be "some way in which damages can be awarded where a wrong is done."[12] We believe that there will be a proper way found under the applicable substantive principles at

[11] See Respondents' Brief and Supplemental Appendix In Opposition To Petition For Writ Of Certiorari, p. 1.

[12] It is apparent that the possibility of injunctive relief will not suffice to deter would-be violators. For example, in this very case, the complaint was filed on May 2, 1966, and on July 1, 1966, the complained of practices were changed, petition for writ of certiorari at 2 and 8, n. 2.

the appropriate time to insure that the damages are not kept by the adjudicated wrong-doer, but that is a matter which this Court need not reach at this time since the ability to distribute damages to unknown class members does not relate to the question of whether immediate personal notice must be given to known members by the named plaintiff.

B. Neither Rule 23 Nor Due Process Precludes This Alternative Approach

Against this rather common sense approach to the problem, two separate sets of objections might be made. The first of these is that Rule 23 does not authorize any such procedure, and hence it cannot be permitted. The answer to this is that nothing in Rule 23 specifically precludes it, and unless some procedure of this type is developed, consumer class actions under Rule 23(b)(3) will simply fall by the wayside, a result which the framers of that Rule could not have intended.

The second objection, and one which the Court of Appeals found compelling, is that "due process" precludes any procedure which does not include individual notice to members of the class before any action is taken on the merits. While it is undisputed that the notice provisions of Rule 23 were included to insure procedural fairness,[13] procedural fairness was never intended to be construed in so inflexible and all-encompassing a manner as to eliminate significant consumer class actions brought under Rule 23(b)(3) and thereby to deny rights that the substantive law created. As this Court has held, the

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[13] See Advisory Committee Notes, 39 F.R.D. 98, 99, 103 (1966).

concept of due process is a relative one and must be evaluated in light of the relevant circumstances. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Therefore, we must ask what alternatives are there to the proposed procedures outlined above, and do they provide greater procedural fairness and protection to the two groups of people most affected – the members of the plaintiff class and the defendants.

The alternative which the Court of Appeals held to be required by Rule 23 (making the plaintiff pay all of the costs in advance) is no real alternative since it will require the dismissal of almost every consumer class action brought under Rule 23(b)(3). On the other hand, requiring the defendants to pay the cost of personal notice in advance would equally be unfair since they would have no realistic chance of recovering those costs even if they prevail on the merits. Thus, neither of these alternatives presents a realistic solution to the problem, regardless of whether the mini-hearing is employed, if the costs involved are those of giving personal notice to all known class members. [14]

Moreover, viewed on its own terms, the proposal is fair to both members of the plaintiff class and to the defendants. It cannot be denied that the absence of personal notice limits the opportunities for members of the plaintiff

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[14] If the costs of general notice are relatively significant, the mini-hearing should be used to determine how to allocate the costs of that notice in order to insure that even those costs don't overwhelm a plaintiff with a meritorious case. While nothing in the Rules specifically authorizes a mini-hearing, nothing prohibits it either. It would be a sad day for justice in the federal courts if district judges were limited only to the specific procedural devices spelled out in the Rules in handling new and complex problems of judicial administration.

class to participate in the litigation of the issues on the merits nor that the absence of participation might, in some cases, produce an unfavorable result to the plaintiffs. But the alternative is a denial of *any* recovery in almost every other case since there will be virtually no class actions under Rule 23(b)(3) without some procedural innovation of the kind suggested here. We submit that the possible harm caused by non-participation by individual class members who do not learn of the action before liability is determined, is a small price to pay for giving members of the class at least the opportunity to recover their damages, an opportunity which will simply be unavailable if the decision of the Court of Appeals is upheld by this Court.

Under the proposal of *amici*, the members of the class would be bound by the outcome of the case and would be barred from further attempts to recover the money should the named plaintiff prove unsuccessful. Their recovery might also be less than the amount prayed for in the complaint, and they might have obtained a larger recovery if they had been able to participate. But, if we do as the Manual for Complex Litigation suggests,[15] and make a "realistic evaluation of the 'other available methods,'" this proposal is by far the fairest to members of the plaintiff class since they are sacrificing only a possibility of increasing their recovery or achieving a victory rather than a loss, but are exchanging it for an opportunity to have their causes of action litigated on the merits.

The due process cases in this Court cited by the Court of Appeals and the Advisory Committee[16] all involve

[15] 1 Pt. 2 Moore's Federal Practice, Pt. 1.43, p. 37.

[16] See 479 F.2d at 1017, n. 21 and 39 F.R.D. at 107.

situations which are distinguishable from this case. In those cases [17] the person who was found to have given the defective notice had an interest in conflict with the person who did not receive the notice. In this case, however, the absent class members are aligned with the person giving the notice (the named plaintiff), an alignment which is independently verified by the District Court in its determinations that plaintiff's claims are typical and that he adequately represents the members of the class. See Rules 23(a)(3) and 23(a)(4). [18] Accordingly, the "protection" which notice provides is far less of a necessity than in other actions. More importantly, in practical terms, if full notice is required, there will be no case at all, and the absent members of the class will be left without a remedy. Thus, the situations involved in the due process cases relied upon by the Court of Appeals and the Advisory Committee are so different from this case as to make those decisions inapposite.

Moreover, if due process precludes an adjudication involving members of the class without individual notice to them, the same due process objections would also apply to many actions brought under Rules 23(b)(1) and 23(b)(2), and yet notice is not required in those cases. See *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940) and Rule 23(c)(2). For example,

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[17] *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); and *Hansberry v. Lee*, 311 U.S. 32 (1940).

[18] Since it is in the interests of the defendant to demonstrate absence of typicality and inadequate representation, and thereby to deny plaintiff the right to maintain the case as a class action, there is adequate assurance that the proceeding will be adversary and that the District Court will not have to operate in the dark in deciding these questions.

an action to compel the payment of a dividend brought under subdivision (b)(1) affects every shareholder, and yet there is no requirement of individual notice to each of them. Similarly, what purport to be injunctive actions under Rule 23(b)(2) will often have significant monetary aspects to them, such as an action to enjoin a state official from underpaying a class of welfare recipients in violation of federal standards. If individual notice had to be given by the named plaintiffs to every member of those classes, there would be no actions of those kind, and yet there is no distinction between those cases and this one for purposes of due process. Finally, even the settlement procedures approved by the Second Circuit in *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1082-83, 1090-91, *cert. denied sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971), would also have unconstitutionally deprived members of the class of individual consumers of the monies to which they were entitled because individual notice was not provided to them.

In short, there are no real due process problems with respect to the members of the plaintiff class. While it would be "preferable" to give each class member personal notice before litigating the case on the merits, reasons of practicality eliminate that as a realistic consideration. The result is that either no notice is given, but there remains a possibility of recovering damages, or if that is held unconstitutional, the elimination of any possibility of recovery at all.[19] We see no reasonable basis for eliminating

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[19] As this Court noted in *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962), there are "practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every

(continued)

that possibility, and the proposal set forth above clearly allows for it.

Insofar as the defendants are concerned, there are no due process problems of fairness to them that would apply under the procedures that we have outlined. If every member of the class is bound, the defendants will have all of the protection to which they are entitled from the judgment; and they will have that protection without having to pay for the cost of notice to every member of the plaintiff class. But even if due process were to preclude the defendants from utilizing the judgment against other members of the plaintiff class, they run no real risk of having to litigate the case again. First, there would be the *stare decisis* effect of the prior determination on the merits which in some cases would include an authoritative ruling by this Court. Second, statute of limitations problems might prevent other plaintiffs from seeking to relitigate the issues. Third, and perhaps most important of all in a practical sense, is the unlikelihood that, because of inertia and a prior defeat, another plaintiff would make another try.

Evidence of the absence of any real need by most defendants to obtain the *res judicata* effect of a decision on the merits as a practical matter is contained in the pattern followed by the defendant in *Partain v. First Nat'l Bank of Montgomery*, 336 F. Supp. 65 (M.D. Ala. 1971). Without answering the complaint or permitting plaintiffs to move to certify the class, the defendant moved for summary judgment, and the motion was granted, without prejudice to the unnamed members of the class. The fact that the judgment,

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[19] (continued) situation." See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950): due process requires "notice and opportunity for hearing appropriate to the nature of the case."

which was reversed on appeal,[20] would have been good only against the three named plaintiffs, did not deter the defendant from making its motion for the obvious reason that there was no realistic possibility that anyone else would bring another identical action.[21] Finally, if a defendant wanted to insure that every member of the class was bound, it could always pay the costs of personal notice to the absent members, in which case the *res judicata* effect of the prior determination would be conclusive.

III. CONSUMER CLASS ACTIONS PERFORM AN ESSENTIAL FUNCTION IN OUR LEGAL SYSTEM

This Court's ultimate judgment with respect to the notice requirements of Rule 23 and the due process clause, as well as such other critical issues as manageability and fluid recovery, will determine the future viability and scope of the class action damage suit. We submit that consumer class actions perform a vital function in the American legal system, a function whose importance will increase as mass marketing techniques and economic concentration continue to increase.

The decision below is predicated on the assumption that the sole objective of civil damage litigation is "to afford compensation to the injured consumer." 479 F.2d at 1019. The Court of Appeals refuses to acknowledge that a major function of civil litigation is to prevent the occurrence

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[20] *Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 127 (5th Cir. 1972).

[21] This is the procedure followed by the defendants in *Ditlow v. Pan Am, supra*, now pending before the Court of Appeals for the District of Columbia Circuit.

of such injuries, through a system in which compensation, in the form of damage judgments (whether or not fully distributed to the actual victims of those who violate the law), is also the vehicle of deterrence. *See generally* B. Moore, *The Potential Function of the Modern Class Suit*, 2 Class Action Rep. 47 (1973). Compensation of aggrieved individuals is unquestionably an important and desirable objective in its own right, *id.* at 48 n. 7., but compensation alone can achieve little more than pacification of those few individuals sufficiently outraged by their injuries to embark upon the treadmill of litigation. A legal system premised exclusively upon compensation cannot deter violations of law by which citizens – corporate and individual – must order their conduct.[22]

The nature of the modern economy is increasingly such that the individual's quest for compensation, whether through his own personal lawsuit or as a member of a class, cannot be relied upon to deter violations of the law. This is particularly true of the relationship between consumers and the businesses with which they deal. Under our economic system, violations of the antitrust and other consumer protection laws often produce injuries that are

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22 The Court of Appeals equated multi-million dollar class damage settlements with "legalized blackmail," terming such sums "astronomical." 479 F.2d at 1019. We suggest, however, that the proper equation is between the "astronomical" wrongdoing of the defendants and a recovery by their victims of no more than the defendants' ill-begotten gains. Even where the class recovery includes a penalty, as in the Clayton Act's treble damage provision, Congress is presumed to have determined that optimum deterrence requires recovery of actual damages plus the penalty in order, for example, to compensate for inherent deficiencies in the litigation process. Moore, *supra*, at 48-49.

immense in the aggregate, but are meted out to individual consumers in amounts so small as to preclude individual redress through litigation.[23] It is precisely the ability of these mass produced, invisible torts to escape the remedial deterrence of the civil litigation process that has enabled them to survive, while many far less costly, but more blatant forms of business misconduct of earlier periods have declined. To accomplish the goal of deterrence through the civil courts, without resort to the viable form of class proceeding rejected by the Court below, would require the active participation of individual consumers in hundreds of small lawsuits in their own names. To impose such a burdensome alternative to an effective class damage suit upon them and upon our judicial system would be neither feasible nor desirable.

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[23] It may be argued that cases such as this, even when handled as class actions, do not provide sufficient compensation to warrant the costs of litigation and distribution. The Court of Appeals estimated that the average member of the class would have sustained damages of $1.30 which when trebled would total $3.90, and suggested that because the cost of distribution "might run into the millions of dollars . . . the class action was hopelessly unmanageable." 479 F.2d at 1010. That position incorrectly assumes that under the Clayton Act it is the plaintiffs who must absorb those costs, and also neglects to take into account the deterrent effect of that judgment on other would-be violators in assessing the benefits derived from it. Moreover, in *Ditlow v. Pan Am*, *supra*, if recovery is allowed under plaintiff's antitrust claim, each person will receive approximately $120, and hence the economic justification for distribution to individual claimants is undisputed, as it undoubtedly will be in many cases where the individual damages, although too small to permit non-class litigation, far exceed the estimated recovery per person in this case.

This Court should approach the issues raised in this case in this light: that a damage recovery in behalf of a consumer class is in a broader sense a recovery on behalf of all consumers and that all consumers may rely on the courts to facilitate legitimate class recoveries by others, to deter injuries to themselves.

CONCLUSION

As we have demonstrated above, there is a rational, fair alternative, consistent with notions of due process and Rule 23, which enables this case to go forward as a class action under Rule 23(b)(3) without unduly burdening either the plaintiffs or the defendants. Accordingly, the decision of the Court of Appeals should be reversed, and the matter remanded for further proceedings in accordance with that alternative.

Respectfully submitted,

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November 29, 1973

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, individually and on behalf of all persons using transpacific air transportation since May 1, 1973, *Plaintiffs,*	)	
v.	)	CIVIL ACTION NO. 999-73
PAN AMERICAN WORLD AIRWAYS INC., *et al.,* *Defendants.*	)	CLASS ACTION

COMPLAINT FOR MONETARY DAMAGES

1. This is an action brought individually and on behalf of a class of all persons who, on or since May 1, 1973, have flown between points in the United States and points in Asia/Australia/Australasia and islands in the Pacific (the "transpacific market") on any of defendant airlines. Plaintiff on behalf of himself and the class seeks damages for the unlawful charging by defendants of fares not contained in currently effective tariffs and for the charging of fares unlawfully agreed to by defendants in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

2. This Court has jurisdiction pursuant to 15 U.S.C. §15 and 28 U.S.C. §1337.

3. Between May 15, 1973, and May 20, 1973, plaintiff Clarence M. Ditlow made a round-trip journey from Washington, D.C., to Tokyo, Japan, on defendant Northwest Airlines, Inc. ("Northwest"). The portion of that journey

in the transpacific market was from Anchorage, Alaska, to Tokyo and from Tokyo to Seattle, Washington (the "West Coast-Tokyo journey"), for which plaintiff Ditlow was charged $875.80.

4. The defendants are airlines authorized by the Civil Aeronautics Board ("C.A.B.") to engage, *inter alia*, in the transportation of passengers in the transpacific market.

FIRST COUNT

5. During March 1973 defendants met in London, England, and agreed on fares for travel in the transpacific market to become effective on May 1, 1973 (the "London Agreement"). These fares included a 5% increase in the then effective transpacific fares, which was purported to reflect the devaluation of the dollar which occurred in February, 1973.

6. On and since May 1, 1973, defendants have implemented the London Agreement and have been demanding, collecting and receiving fares which reflect said 5% increase.

7. The London Agreement has had a substantial effect on foreign commerce in the transpacific market.

8. The London Agreement constitutes an unlawful contract, combination, and conspiracy in restraint of commerce with foreign nations and is a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

9. Because the C.A.B. has not approved the London Agreement pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, defendants are not entitled to the relief granted by Section 414 of the Federal Aviation Act, 49 U.S.C. §1384, from the operation of the antitrust laws.

10. As a result of the said unlawful London Agreement, plaintiff Ditlow was charged $875.80 for the West Coast-Tokyo journey by defendant Northwest, whereas in the absence of said unlawful agreement, he would have been charged no more than $834.00.

11. Pursuant to 15 U.S.C. §15, plaintiff Ditlow is entitled to recover from defendant Northwest and the other defendants three-fold his damages of $41.80, for a total of $125.40, plus the costs of this action, including a reasonable attorney's fee.

SECOND COUNT

12. Repeats each and every allegation of paragraphs 5-9, inclusive.

13. As a result of the unlawful London Agreement, defendants have been charging and collecting from all passengers flying in the transpacific market fares which are 5% greater than the fares which defendants would have charged in the absence of that agreement.

14. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines and who have been charged fares pursuant to the London Agreement.

15. The members of the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will

fairly and adequately protect the interests of the class; and a class action is superior to other available methods for fair and efficient adjudication of the controversy between members of the class and defendants.

16. As a result of the unlawful London Agreement, each member of the class has been damaged in an amount equal to approximately 5% of the fare which he was charged for his transpacific flight, with the total amount of damages to the class being approximately $1,700,000.

17. Defendants are jointly and severally liable for the damages each member of the class has sustained.

18. Pursuant to 15 U.S.C. §15, each member of the class is entitled to recover from the defendants threefold his damages, for a total estimated recovery of $5,100,000, plus the costs of this action, including a reasonable attorney's fee.

THIRD COUNT

19. Section 403(b) of the Federal Aviation Act, 49 U.S.C. §1373(b), provides in relevant part: "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs . . ."

20. As of May 1, 1973, defendants, who are either air carriers or foreign air carriers within the meaning of 49 U.S.C. §1373(b), have had no currently effective tariffs for travel in the transpacific market.

21. The last non-interim tariff which defendants filed with the C.A.B. for transpacific flights expired on March 31, 1973.

22. For the period from April 1, 1973, to April 30, 1973, inclusive, defendants had on file with the C.A.B. tariffs which were 5% greater than the tariffs described in paragraph 21.

23. For his round-trip West Coast-Tokyo journey, plaintiff Ditlow was charged by, and paid to, defendant Northwest $875.80, which is the amount of the tariff which was effective only for the month of April and which is $41.80 greater than the tariff in effect prior to said temporary April tariff.

24. Said fare of $875.80 was unlawfully charged and collected by defendant Northwest because such fare was not contained in a tariff effective at the time it was charged and collected.

25. As a result of Northwest's charging an amount in excess of that reflected in a currently effective tariff, Northwest was in violation of Section 403(b), and plaintiff Ditlow is entitled to recover $41.80 from defendant Northwest.

FOURTH COUNT

26. Repeats each and every allegation of paragraphs 19-22, inclusive.

27. Commencing on May 1, 1973, all of the defendants have been charging passengers in the transpacific market 5% more for fares than they charged in the tariff referred to in paragraph 21.

28. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines

and who have been charged an amount greater than that reflected in the tariff referred to in paragraph 21.

29. The members of the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of the plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for fair and efficient adjudication of the controversy between members of the class and defendants.

30. As a result of defendants' unlawfully charging fares in violation of Section 403(b), each member of the class is entitled to recover from the defendant airline on which he or she flew an amount equal to the 5% difference between the fare charged and paid and the last non-temporary trans-pacific tariff which defendants had filed with the C.A.B., with the total amount of damages to the class being approximately $1,700,000.

WHEREFORE, plaintiffs pray for:

1. a judgment for plaintiff Ditlow on count one in the amount of $125.40, plus costs of this action and a reasonable attorney's fee; or if that relief is denied, a judgment in the amount of $41.80 on count three;

2. a judgment on count two against the defendants jointly and severally in favor of each member of the plaintiff class for threefold the damages each member of the class sustained as a result of the defendants' unlawful London Agreement, for a total of approximately $5,100,000, plus costs of bringing this action and a reasonable attorney's fee; or if that relief is denied, a judgment in favor

of each member of the plaintiff class on count four against the defendant airline on which he or she flew in the trans-pacific market for the amount by which what said member paid exceeds the amount of the fare effective in the tariff which expired on March 31, 1973, for a total of approximately $1,700,000;

3. an order granting plaintiffs such other and further relief as may be just and proper; and

4. an order awarding plaintiffs their costs and disbursements in this action.

Dated: Washington, D.C.
May 22, 1973

/s/ Alan B. Morrison
Alan B. Morrison

/s/ Raymond T. Bonner
Raymond T. Bonner

Attorneys for Plaintiffs